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IN THE

SUPREME COURT OF THE UNITED STATES.

WALTER SCOTT, an Infant, by Ernest Scott, His Next Friend,
Petitioner,
vs.
STANDARD CONVEYOR COMPANY, a Corporation,
Respondent.

No. 153

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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INDEX.

Page

Subject Index.

Petition for writ of certiorari 1-24

Opinion of the United States Court of Appeals, Eighth Circuit 2

Jurisdiction of the Supreme Court of the United States 2

Date of Judgment to be reviewed 2

Questions presented 3

Summary Statement of the matter involved 6

Reasons relied on for the allowance of the writ 15

Argument 18

Prayer for the writ 24

Appendix 25

Authorities Cited.

Erie R. Co. v. Tompkins, 58 S. Ct. 817, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1487 ..... 17, 20, 23

Fortner v. St. Louis Public Service Co. (Mo. Sup.), 244 S. W. 2d 10 ..... 5, 6, 16, 24

Frese v. Wells (Mo. Sup.), 40 S. W. 2d 652 ..... 5, 6, 16, 24

Hercules Powder Co. v. Crawford, 163 F. 2d 968 (C. C. A., 8th Circuit) 20

McLeod v. Linde Air Products Co., 318 Mo. 397, 1 S. W. 2d 122 ..... 4, 16, 19, 20

Murphy v. Missouri Power and Light Co. (Mo. App.), 214 S. W. 2d 742 ..... 4, 5, 16, 19, 20

Parker v. Nelson Grain and Milling Co., 330 Mo. 95, 48 S. W. 2d 906 ..... 5, 6, 16, 24

Rouchene v. Gamble Construction Co., 338 Mo. 123, 89 S. W. 2d 58 ..... 5, 6, 16, 23

Swain v. Anders, 349 Mo. 963, 163 S. W. 2d 1045 ..... 5, 6, 16, 23

Statutes Cited.

Title 28, U. S. C., Sections 1254 (1) and 2101 (c) (28 U. S. C. A., Sections 1254, 2101) 2

Court Rule.

Rule 19, Section 1 (b) of the Revised Rules of the Supreme Court of the United States 2

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To the United States Court of Appeals for the Eighth Circuit.

Comes now Walter Scott, an infant, by Ernest Scott, his next friend, and respectfully petitions this Honorable Court to grant a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit, rendered and entered on the 7th day of April, 1955, in the cause lately pending in said Court of Appeals, entitled "Standard Conveyor Company a corporation, Appellant, versus Walter Scott, an Infant, by Ernest Scott, his next Friend, Appellee," being cause number 15,174 of the Civil causes on the docket of said

Court of Appeals, reversing a judgment of the United States District Court for the Eastern Division, Eastern District of Missouri, in said cause, said judgment of the District Court being in favor of your petitioner (plaintiff below) and against respondent (defendant below).

OPINION OF THE COURT BELOW.

The opinion of the United States Court of Appeals for the Eighth Circuit in the cause of "Standard Conveyor Company, a corporation, Appellant, versus Walter Scott, an Infant, by Ernest Scott, his Next Friend, Appellee," of which opinion petitioner here seeks review, appears on pages 110-116, inclusive, of the record filed herewith. Said opinion has not as yet been published.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

Judgment of the Court of Appeals was entered on April 7, 1955 (R. 117), and on April 25, 1955, petitioner filed in said Court his motion for rehearing (R. 118), which was denied by the Court of Appeals on May 3, 1955 (R. 126). Petitioner's motion to stay issuance of mandate was filed on May 13, 1955, and on May 19, 1955, said Court ordered its mandate stayed for a period of thirty days pending filing of this petition in this Court within said time (R. 127).

The jurisdiction of this Honorable Court is based upon Title 28, United States Code, Sections 1254 (1) and 2101 (c) (28 U. S. C. A., §§ 1254, 2101), and upon Rule 19, Section 1 (b) of the Revised Rules of this Court, providing for review by writ of certiorari of judgments in cases in which a Court of Appeals has decided an important question of local law in a way in conflict with applicable local decisions.

QUESTIONS PRESENTED.

The questions presented by petitioner's petition for a writ of certiorari are as follows:

1. Taking that view of the evidence most favorable to the plaintiff (the jury having found the issues in favor of the plaintiff) that if the conveyor had been erected as called for in the specifications there would have been approximately an inch, maybe an inch and a quarter, between the roller and the belt, but that there was a change in the conveyor between the way it was originally designed and the way it was finally installed (R. 30); that a notch was job cut in the frame of the roller conveyor which reduced this space to only ⅜ths of an inch (R. 30); that he (plaintiff) would have a hard time getting his hand caught between the rollers with an inch space between the roller and the belt (R. 68); that if a package gets stuck at the junction of the power conveyor and the gravity conveyor a man would have to go there, that they would be very close to the conveyor in doing so (R. 50), and that if a container got stuck a person could just push it and it would go on (R. 51); that in so pushing a container, plaintiff's hand slipped off the container and was caught in the narrow space of ⅜ths of an inch between the roller and the belt (R. 8, 21, 22), causing serious and permanent injuries to his right hand and wrist (R. 8, 9, 12-18); that two persons (plaintiff being one) were injured by the appliance within a space of two days, the second injury occurring only eleven days after the installation of the conveyors (R. 35); that in the opinion of L. D. Tracy, safety engineer, the construction of the conveyor was a very unsafe condition for the use for which it was designed (R. 31) and that any clearance that endangers property or person at a point such as this happened to be is not good safety engineering (R. 30); that defend-

ant's own expert witness, Elmer S. Stanley, would prefer to see a safety device of some kind in that position (R. 64); that in the opinion of John C. Georgian, also defendant's expert witness, if there is a possibility of a man's hand getting in between those two rollers, if there is a very good likelihood of people working close by these rollers and having to take objects off at this exact point so that their hands are liable to be caught between these two rollers, it would then be necessary for the manufacturer to be sure that there is a safeguard of some type or other at this transfer point (R. 69); quaere, is the opinion of the Court of Appeals for the Eighth Circuit, holding "the placing of the conveyors only ⅜ths of an inch apart did not create an inherently or imminently dangerous condition" in conflict with applicable local law and the decision of the Supreme Court of Missouri in McLeod v. Linde Air Products Co., 318 Mo. 397, 1 S. W. 2d 122, holding that the manufacturer, seller or furnisher of an article is liable to third persons having no contractual relations with him for negligence in construction, manufacture or sale of such articles, where the article, when applied to its intended use becomes dangerous, although not inherently so, and also the decision of the Kansas City Court of Appeals in Murphy v. Missouri Power and Light Co. (Mo. App.), 214 S. W. 2d 742, holding under facts and issues substantially similar and identical in principle to the instant case, that "the assembly of such appliances and their installation by the defendant must be considered a unit or a completed thing and that the construction must be done in a careful manner so that it will not **become dangerous** when used for its intended purpose," and that the trial Court should not have dismissed plaintiff's petition?

2. Upon the facts above hypothesized, quaere, is the opinion of the Court of Appeals for the Eighth Circuit holding that "the placing of the conveyors only three-eighths of an inch apart did not create an inherently or

imminently dangerous condition" in conflict with applicable local law and the decisions of the Supreme Court of Missouri in Swain v. Anders, 349 Mo. 963, 163 S. W. 2d 1045; Rouchene v. Gamble Construction Co., 338 Mo. 123, 89 S. W. 2d 58; Frese v. Wells (Mo. Sup.), 40 S. W. 2d 652; Parker v. Nelson Grain and Milling Co., 330 Mo. 95, 48 S. W. 2d 906; Fortner v. St. Louis Public Service Co. (Mo. Sup.), 244 S. W. 2d 10, and other cases too numerous to cite, all holding that where reasonable men may differ as to whether an act or an omission or failure to act was negligent, the question of negligence or no negligence is one to be determined by the jury?

3. Upon the facts above hypothesized, and upon the additional fact that Conway Briscoe, a mechanical engineer and Director of Public Utilities for the City of St. Louis, was of the opinion that the clearance between the roller and the belt would not be as visible to a lay person as to an engineer, and that an engineer would spot it readily but a lay person would most likely find out the hard way, by getting their hand in there (R. 29); quaere, is the opinion of the Court of Appeals for the Eighth Circuit, holding that "it is perfectly obvious that there was nothing latent, hidden or defective about the condition and that the distance between the two conveyors was open and obvious for all to see" in conflict with applicable local law and the decision of the Kansas City Court of Appeals in Murphy v. Mo. Power and Light Co. (Mo. App.), 214 S. W. 2d 742, holding, under facts and issues substantially similar and identical in principle to the instant case, that the court could not say as a matter of law that such a condition was so open and obvious that plaintiff could not recover?

4. Upon the facts above hypothesized, is the opinion of the Court of Appeals for the Eighth Circuit, holding that "it is perfectly obvious that there was nothing latent, hidden or defective about the condition and that the space

between the two conveyors was open and obvious for all to see'' in conflict with applicable local law and the decisions of the Supreme Court of Missouri in Swain v. Anders, 349 Mo. 963, 163 S. W. 2d 1045; Rouchene v. Gamble Construction Co., 338 Mo. 123, 89 S. W. 2d 58; Frese v. Wells (Mo. Sup.), 40 S. W. 2d 652; Parker v. Nelson Grain and Milling Co., 330 Mo. 95, 48 S. W. 2d 906; Fortner v. St. Louis Public Service Co. (Mo. Sup.), 244 S. W. 2d 10, and other cases too numerous to cite, all holding that the question of negligence is always for the jury when the evidence on material points is conflicting, or where, the facts being undisputed, different minds may reasonably draw different conclusions from them?

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The jurisdiction of the trial Court is based on the fact that plaintiff, a citizen of Missouri, sued defendant, a citizen of Minnesota, to recover Twenty-five Thousand Dollars ($25,000) for damages and personal injuries. The action was instituted in the State Court and was removed to the United States District Court by defendant. The damages were sought for personal injuries to plaintiff's right hand, which was caught between two rollers of a package conveyor. The cause was tried to a jury and resulted in a verdict for plaintiff.

Plaintiff, in his petition, alleged, among other things, that defendant negligently designed, manufactured and installed the conveyors.

Defendant denied the charge of negligence and that the conduct of defendant was the proximate cause of plaintiff's injuries.

Plaintiff, a seventeen-year-old youth, was, at the time of the injury, an employee of the Schneithorst Concessions

at the St. Louis Municipal Airport. In addition to operating a restaurant at said Airport, Schneithorst Concessions was also engaged in preparing food to be served to airplane passengers (R. 6). The food was transported to the airplanes in metal containers which were placed on a power-driven belt conveyor at the basement level of the building and carried thereby up to the ground level, where they were discharged by the belt conveyor onto a gravity roller conveyor, from which they were loaded onto trucks (R. 6, 7).

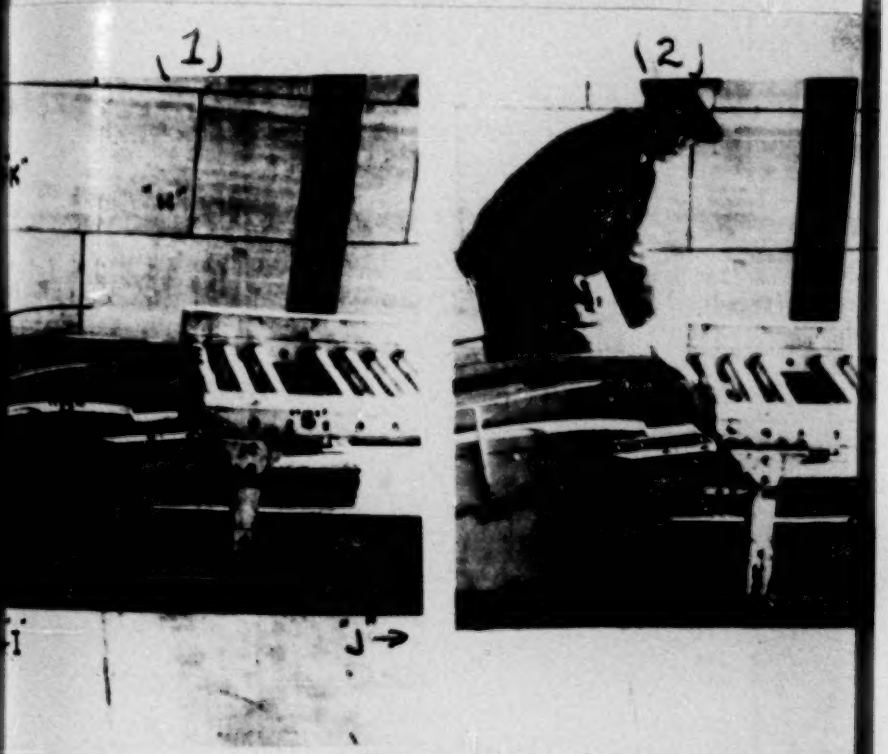
Defendant (respondent) by contract with Schneithorst (R. 74-84) had manufactured and installed both the power-driven belt conveyor and the fixed roller gravity conveyor (R. 3, 47, 48, 54). It had completed installation of the conveyors about September 15, 1951 (R. 25), eleven days before the accident to this plaintiff.

The two conveyors were standard stock units designed and manufactured by defendant (R. 3, 54). Defendant installed them, not as designed and manufactured, but by cutting a notch in the end of the roller conveyor frame so that it would fit closer to the belt conveyor than the design or blueprint called for. This notch was cut with a hack saw on the job and was not according to the design or blueprint (R. 30, 31, 32, 34, 57, 58, 68). As installed, the space between the first roller of the roller conveyor and the belt was 3/8ths of an inch. If the conveyor had been erected as called for in the specifications there would have been approximately an inch or an inch and one-quarter between the roller and the belt (R. 30), a space that would be safer for a man's hand than three-eighths of an inch (R. 68, 71). The specific negligence complained of by plaintiff is this narrowing of the space between the end of the belt of the power-driven conveyor and the first fixed roller of the gravity conveyor in such a manner that a person's hand would be injured if caught between the

rough, knurled finish of the rubber belt (R. 26) and the stationary roller permanently fixed and fastened to the bed of the conveyor (R. 27, 28).

Plaintiff's Exhibits E-1 and E-2 (R. 45), reproduced herein, show the junction of the two conveyors as installed and show the notch in the frame of the roller conveyor, above described.

PLAINTIFF'S EXHIBITS E-1 AND E-2.



Arrow on Belt indicates direction of travel at time of accidents. Area in circle at letter "C" indicates notch cut from roller conveyor on job to allow placing the two conveyors closer together than the installation was designed for. There is ⅜" clearance between belt and first roller.

(A) Reverse Rod.
(B) Steel Roller Conveyor.
(C) Take-Up or Drive Drum.
(D) Slider Bed.
(E) Steel Roller Bearing Roller, 2½" in diameter.
(F) ¼" thick rough finish Rubber Belt.
(G) Bar attached to belt and roller Conveyor to prevent separation.
(H) Side wall of steps from administration building.
(I) Steps to basement.
(J) To loading area.
(K) Location of present operating switch, which is common throw switch type.

It will be noted that the fourth roller in the conveyor is missing. This was removed by the writer to replace the first roller that had been removed until the proper protection can be afforded.

Plaintiff had seen the man install the conveyor and had seen it working before but had not paid much attention to it. He had done only janitor work until he was assigned to help the flight boy remove the food from the conveyor twenty or twenty-five minutes before the accident (R. 6, 7). At the time of the accident he was standing at the top receiving the cans from down below. Sometimes if a can was not sitting straight when it came up to where the conveyor belt and rollers connect, it would stop at the roller and the belt would keep on going under it. When this happened he had been told to push the can and that would kick it free and it would roll down the gravity conveyor (R. 7, 8). That is what he had seen the other boys do (R. 21). In this connection J. R. Moran, defendant's witness and employee, who had supervised the installation of this belt conveyor, testified that if a package gets stuck at the junction of the power conveyor and the gravity conveyor a man would have to go there, and just push it and it would go on (R. 50, 51).

Plaintiff had removed all of the other containers from the rollers and was getting ready to receive the last container, a large one, three or four feet high, when it got hung where the electric conveyor and the rollers connect together. He put his right hand on the back side of the container about eighteen inches or two feet above the power conveyor to push it so it would get loose. He didn't try to dislodge the container by taking hold of it at the bottom (R. 21, 22). His hand was damp from sweat and it slipped on the container when he pushed and it went down between the belt and the roller. He tried to pull his hand out and couldn't and then pulled the lever and stopped the machine, then reversed the machine and his hand was released (R. 8, 22).

This occurrence resulted in permanent injury to plaintiff's right hand and wrist (R. 10-18, 60, 61).

Plaintiff's witness, L. D. Tracy, safety engineer, testified that in his opinion the construction of the conveyor was a very unsafe condition for the use for which it was designed (R. 31) and that any clearance that endangers property or person at a point such as this happened to be is not good safety engineering (R. 30).

Defendant's expert witness, Elmer S. Stanley, testified that he would prefer to see a safety device of some kind in that position (R. 64) and defendant's expert witness, John C. Georgian, testified that if there is a possibility of a man's hand getting in between those two rollers, if there is a very good likelihood of people working close by these rollers and having to take objects off at this exact point so that their hands are liable to be caught between these two rollers, it would then be necessary for the manufacturer to be sure that there is a safeguard of some type or other at this transfer point (R. 69).

In the approximately eleven days in which these conveyors had been in use, two persons (plaintiff being one) were injured by the appliance. Two days before plaintiff's injury, a five-year-old boy, a member of the public, had his hand and arm pulled down into the conveyor right where the roller conveyor meets the belt conveyor (R. 35, 36).

The persons who installed the equipment stated, in substance, that it was necessary for the two conveyors to be close together so that the packages to be conveyed would not tip into the space between the two conveyors and thus stop (R. 48, 49).

There was other testimony from which the jury could conclude that the conveyors would satisfactorily convey the containers for which they were designed, even if installed as designed. If erected as called for in the specifications there would have been approximately an inch, maybe an inch and one-quarter, between the roller and

the belt (R. 30). If an inch and one-half space separated the two rollers the distance from the top radius of the belt or roller and the top radius of the first roller on the roller conveyor would be six inches, which would pass a twelve inch container (R. 69). From this the jury could infer that if the distance between the rollers were reduced to one inch or one inch and one-quarter, as designed, the distance from the top radius of the belt or roller and the top radius of the first roller on the roller conveyor would be less than six inches and would pass a twelve inch container. A twelve inch container was the smallest container the conveyor was to handle (R. 50, 75).

L. D. Tracy, safety engineer, testified that he had taken into consideration that the type of packages (containers) varied but that none were small enough to require that narrow clearance between the fixed rollers and the power drum on the conveyor belt (R. 30, 31).

Conway Briscoe, a mechanical engineer and Director of Public Utilities for the City of St. Louis, testified that the roller could have been moved back from the belt far enough to permit a human hand to go down there and not crush it without destroying the efficiency of the conveyor (R. 29).

Following this accident this first fixed roller of the roller conveyor was removed (R. 58). Even with the first roller removed Schneithorst continued to use the roller conveyor for some time to send up those commodities (R. 38).

As to the condition being open and obvious, Conway Briscoe further testified that in his opinion, the clearance between the roller and the belt would not be as visible to a lay person as to an engineer, and that an engineer would spot it readily, but a lay person would most likely find out the hard way, by getting his hand in there (R. 29).

At the close of all the evidence defendant moved for a directed verdict, which motion was denied by the trial Court (R. 86, 87).

The jury returned a verdict in favor of plaintiff for $25,000.00 (R. 96). Subsequent to the jury's verdict and the entry of judgment thereon, defendant moved that the verdict and judgment be set aside and for judgment in its favor in accordance with its prior motion for a directed verdict, or in the alternative, for a new trial (R. 98-101). The trial Court denied defendant's motion for a judgment, but directed that the alternative motion for new trial be granted unless plaintiff within ten days should remit $7,000.00 of the amount of the judgment (R. 102). Plaintiff filed such a remittitur (R. 103), and the Court entered an order denying defendant's alternative motion for new trial (R. 104).

Defendant then perfected its appeal to the United States Court of Appeals for the Eighth Circuit (R. 105, 106).

In said Court of Appeals the cause was argued on March 3, 1955, submitted upon arguments of counsel and briefs, and was taken under advisement. Thereafter, on April 7, 1955, said Court of Appeals filed an opinion in said cause written by the Honorable Charles J. Vogel, Circuit Judge, and concurred in by the Honorable John B. Sanborn and the Honorable Harvey M. Johnsen, Circuit Judges.

In said opinion the Court of Appeals states in part (R. 114-115):

> "Plaintiff claims here that installing the power-operated portion of the equipment with only ⅜ths inch clearance between the moving belt and the fixed roller created a condition 'inherently or imminently dangerous,' and that therefore defendant is responsible. The persons who installed the equipment stated, in substance, that it was necessary for the two conveyors to be close together so that the packages to be conveyed

would not tip into the space between the two conveyors and thus stop. It is the narrowness of this space of which complaint is made. If placing the conveyors 3/8ths of an inch apart was negligence, what then was the proper distance? A smaller space, instead of preventing a hand from going between the conveyors, might have made for a more severe injury. A greater space might allow an arm or a foot to become involved. It cannot be said, as plaintiff would have us say, that a 3/8ths inch space is negligence and another size is not. The placing of the conveyors only 3/8ths of an inch apart did not create an inherently or imminently dangerous condition.

"It is perfectly obvious that there was nothing latent, hidden or defective about the condition, and that the distance between the two conveyors was open and obvious for all to see. We do not believe it can be said that the condition was inherently or imminently dangerous any more than any moving machinery may be said to be inherently or imminently dangerous. To hold the manufacturer and installer of this equipment liable for injuries would be tantamount to holding the manufacturer and installer of any moving machinery responsible for all injuries connected with its use.

"In order to hold defendant responsible in the instant case, it must be found that the conveyors were inherently or imminently dangerous. The record justifies no such conclusion."

The Court of Appeals held (R. 116) that defendant's motion for judgment notwithstanding the verdict should have been granted and reversed the judgment of the District Court.

Your petitioner thereafter, on April 25, 1955, filed his motion for rehearing (R. 118), which was denied by the Court of Appeals on May 3, 1955 (R. 126).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

This cause was submitted to a jury upon a single assignment of negligence against Respondent (Defendant), that defendant had designed, manufactured and installed said conveyor belt and roller conveyor and knew, or by the exercise of ordinary care should have known, that there was a space of three-eighths of an inch between the conveyor belt and the adjoining fixed and immovable metal roller and that defendant knew, or by the exercise of ordinary care should have known, that a person using the said conveyor in the manner for which it was designed would likely come in contact with said conveyor belt at the place where it joined the metal roller and would be likely to become entangled between said belt and roller, and that in so designing, installing and manufacturing said belt, roller and conveyor, defendant failed to exercise ordinary care and was negligent and that plaintiff's injuries were the direct result of such negligence, if any (R. 89).

At defendant's request, the jury was instructed by the trial court that if the condition complained of was open, obvious and apparent to plaintiff he could not recover against defendant (R. 90) and also that if the conveyor erected and installed by defendant was not inherently dangerous to persons engaged in working with and about same, and that said conveyor did not become imminently dangerous to persons working on and about said conveyor when operated for its intended use, then plaintiff could not recover against defendant (R. 92).

So instructed, the jury returned a verdict in favor of plaintiff, your petitioner, finding that the condition complained of was not open, obvious and apparent, that the conveyor as erected and installed was inherently dan-

gerous or became imminently dangerous when operated for its intended use, and that defendant was negligent.

The Court of Appeals for the Eighth Circuit, in reversing the trial court, held as a matter of law that the condition was open and obvious, that it was not inherently or imminently dangerous (R. 114), and that a judgment should have been entered for defendant notwithstanding the verdict.

The Supreme Court of Missouri in McLeod v. Linde Air Products Co., 318 Mo. 397, 1 S. W. 2d 122, on facts similar in principle to those in the instant case, allowed plaintiff to recover against the manufacturer, stating the rule that a third person, who has had no contractual relations with the manufacturer, may nevertheless hold the latter liable for his negligence in the construction of an article or appliance, even though not inherently dangerous, but dangerous only by reason of its defective condition when applied to its intended use.

This rule has been approved by the Missouri Supreme Court and Courts of Appeals in several later cases and in Murphy v. Missouri Power and Light Co. (Mo. App.), 214 S. W. 2d 742, the Kansas City Court of Appeals, applying this rule to a set of facts and issues strikingly similar, and identical in principle to those in the instant case, held that the trial court erred in dismissing plaintiff's cause of action, and further held that the condition therein complained of was not as a matter of law, open and obvious.

The Missouri Supreme Court in Swain v. Anders, 349 Mo. 963, 163 S. W. 2d 1045; Rouchene v. Gamble Construction Co., 338 Mo. 123, 89 S. W. 2d 58; Frese v. Wells (Mo. Sup.), 40 S. W. 2d 652; Parker v. Nelson Grain and Milling Co., 330 Mo. 95, 48 S. W. 2d 906; Fortner v. St. Louis Public Service Co. (Mo. Sup.), 244 S. W. 2d 10 and other cases too numerous to cite, has held that questions such as those here involved are questions for the jury and state

the rule that where reasonable men may differ the question of negligence or no negligence is one to be determined by the jury, and not to be decided by the Court as was done by the Court of Appeals for the Eighth Circuit in the instant case.

We respectfully submit as sufficient reason for granting the writ that the decisions of the respective Courts of Appeals upon like or analogous facts, and where consistent with the laws and Constitution of the United States, should harmonize with the applicable local law and the decisions of the Appellate Courts of the State affected. The opinion of which review is here prayed is not consistent with the applicable local law as contained in the above cited opinions of the Supreme Court of Missouri and the Kansas City Court of Appeals, which under the decision of this Court in Erie R. Co. v. Tompkins, 58 S. Ct. 817, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1487, the Circuit Court of Appeals was obliged to follow.

Nor is the present case likely to be a single, isolated or unimportant instance. In our modern, mechanized way of life, it is apparent that situations like or analogous to that herein in question will continue to occur. It is therefore of general concern to every person or organization within the boundaries of this State, to have the law of the State uniformly applied by the State's own Courts, and by the United States Courts of Appeals having occasion to interpret and apply that law.

Also, under our constitutional form of government, wherein the right of trial by jury is inherent, it is of utmost importance that the Courts of Appeals should not invade the sacred province of the jury, by substituting its judgment for the finding of the jury upon an issue properly submitted to and resolved by the jury or by failure to accept the finding of the jury on an issue clearly shown to be one on which reasonable minds may differ.

ARGUMENT.

There was ample evidence that respondent (defendant) designed and manufactured a belt driven conveyor and a roller conveyor, both stock units (R. 3, 47, 48, 54), and installed the two units at plaintiff's place of employment, by erecting them end to end, fastened rigidly together (R. 28). If the two units had been erected or installed as called for in the specifications (R. 74-85) there would have been an inch to an inch and a quarter between the rigidly fixed first roller of the roller conveyor and the belt (R. 30). However, defendant did not install them as designed and manufactured, but cut a notch in the end of the roller conveyor frame with a hack saw on the job, not according to the design, blueprint or specifications (R. 30, 31, 32, 34, 57, 58, 68) so that, as installed, the space between the roller and the belt was only ⅜ths of an inch (R. 30), a space less safe for a man's hand than the space there would have been had the conveyors been installed per the specifications (R. 68, 71). Because of this narrow space, plaintiff's hand was drawn into the space between the belt and the roller while using the conveyor for the purpose for which it had been designed and installed (R. 8, 21, 22).

The conveyors had been in use only 11 days, and plaintiff was the second person to receive serious injuries, in practically the identical manner, during that short period of time (R. 35, 36). A safety engineer, L. D. Tracy, testified that in his opinion this was a very unsafe condition for the use for which the conveyor was designed (R. 31). Two of defendant's own experts testified that under the conditions for which the conveyor was to be used, some safety device or safeguard was needed at the point in question (R. 64, 69). Conway Briscoe, a mechanical engineer and Director of Public Utilities for the City of St. Louis, testified that the condition complained of was not

open and obvious to a lay person, although it would be to an engineer (R. 29). On these facts the jury was entitled to find, and did find, that the appliance was inherently dangerous or became imminently dangerous when operated for its intended use, that the condition complained of was not open and obvious and that defendant was negligent. The Court of Appeals for the Eighth Circuit, reversed this finding, however, holding as a matter of law that the appliance was not inherently or imminently dangerous, that the condition complained of was open and obvious and that plaintiff is not entitled to recover for his injuries.

1. The instant opinion is in direct opposition to the local law of Missouri. In McLeod v. Linde Air Products Co., 318 Mo. 397, 1 S. W. 2d 122, the Supreme Court of Missouri held that a third person who has had no contractual relations with the manufacturer, may nevertheless hold the latter liable for his negligence in the construction of an article or appliance, even though not inherently dangerous, but dangerous only by reason of its defective condition when applied to its intended use.

The Kansas City Court of Appeals in Murphy v. Missouri Light and Power Co. (Mo. App.), 214 S. W. 2d 742, applied this rule to a set of facts and issues strikingly similar and identical in principal to those in the instant case. The petition in the Murphy case charged the defendant with having sold to the bank by which she was employed, and negligently and contrary to custom installed, an open electric fan in close proximity to an uninsulated and unenclosed knife-blade electric switch, and that plaintiff in attempting to operate the switch received an electric shock which caused her to automatically withdraw her hand, which came in contact with the open blades of the fan which inflicted injury. The court in its opinion held that the petition stated a cause of action against defendant and that the fan, wires and switch were not of themselves imminently or inherently dangerous,

but that "the assembly of these appliances and their installation by the defendant must be considered a unit or completed thing and that the construction must be done in a careful manner so that it will not become dangerous when used for its intended purpose (l. c. 745). That court also refused to hold as a matter of law that the condition complained of was open and obvious.

Applying the above rule to the instant case, even though the two stock conveyors were not in themselves inherently dangerous, certainly there was ample evidence from which the jury could and did find that when they were installed in close proximity to each other, with only 3/8ths of an inch space between this knurled rubber belt and the fixed rigid metal roller they became imminently dangerous for the use intended. And can it be reasonably said that the condition complained of here was more open and obvious than the unprotected fan and uninsulated knife switch in the Murphy case, supra?

It is plain, we respectfully submit, that the Court of Appeals for the Eighth Circuit has, by its opinion here in question, failed to apply the law of Missouri as announced by the Supreme Court of Missouri and the Kansas City Court of Appeals in the McLeod and Murphy cases above cited, although said Court of Appeals was obliged to do so under the decision of this court in Erie R. Co. v. Tompkins, 58 S. Ct. 817, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1487.

2. The Court of Appeals for the Eighth Circuit in Hercules Power Co. v. Crawford, 163 F. 2d 968, recognized the universally accepted rule that "The jury having found the issues in favor of the plaintiff, we must take that view of the evidence most favorable to the plaintiff, and plaintiff is also entitled to the benefit of such reasonable and justifiable inferences as may reasonably be drawn from the evidence" (l. c. 970).

Petitioner respectfully submits that there was ample evidence from which the jury could and did find that the conveyor as erected and installed became imminently dangerous when operated for its intended use. Two persons (plaintiff being one) were injured by the appliance within a space of two days (R. 35), the conveyor then having been in use only 11 days (R. 25). L. D. Tracy, safety engineer, testified, which testimony was accepted by the jury, that in his opinion the construction of the conveyor was a very unsafe condition for the use for which it was designed (R. 31), and that any clearance that endangers property or person at a point such as this happened to be is not good safety engineering (R. 30). Defendant's own expert witness, Elmer S. Stanley, testified that he would prefer to see a safety device of some kind in that position (R. 64), and defendant's expert witness, John C. Georgian, testified that if there is a possibility of a man's hand getting in between those two rollers, if there is very good likelihood of people working close by these rollers and having to take objects off at this exact point so that their hands are liable to be caught between these two rollers, it would then be **necessary** for the manufacturer to be **sure** that there is a safeguard of some type or other at this transfer point (R. 69). Defendant attempts to justify its failure to provide a spring type safety roller instead of a fixed, rigid roller at this point by arguing that the purchaser didn't specify such a safety device. Petitioner respectfully submits that this argument ignores the essential fact that had the conveyors been installed according to the design, blue prints and specifications there would have been one inch to one inch and a quarter between the belt and the roller (R. 30), a safer distance for a man's hand (R. 68, 71), and no safety device would have been needed.

Does not the Court of Appeals' own question, "If placing the conveyors ⅜ths of an inch apart was negligence, what then was the proper distance?" (R. 114) clearly show that this is a question on which reasonable men may differ?

In holding, "a greater space might allow an arm or a foot to become involved" (R. 114), the Court of Appeals overlooked and failed to take into consideration the testimony of defendant's own witness, J. R. Moran, the installer of the conveyor, that if a package gets stuck at the junction of the power conveyor and the gravity conveyor a man would have to go there, that they would be very close to the conveyor in so doing (R. 50), and that if a container got stuck, a person could just push it and it would go on (R. 51). This would normally be done with the hand, not an arm, foot or any other portion of the body. The conveyor was about 22 inches in elevation (R. 50), which fact, as well as the very nature of the conveyor and its intended use, would make it most unlikely that any portion of the anatomy other than the hand would be placed in contact with or in dangerous proximity to the top of the conveyor so as to become engaged in the space between the rollers at the point in question.

The Court of Appeals accepted the testimony of the persons who installed the equipment, who stated in substance that it was necessary for the two conveyors to be close together so that the packages to be conveyed would not tip into the space between the two conveyors and thus stop (R. 114). This testimony was rejected by the jury, who accepted instead, as they had a right to do, the testimony more favorable to plaintiff, that the roller could have been moved back from the belt far enough to permit a human hand to go down there and not crush it, without destroying the efficiency of the conveyor (R. 29) and that none of the packages to be conveyed were small enough to require that narrow clearance between the fixed rollers and the power drum on the conveyor belt (R. 30, 31), and further, that the conveyors were even used for a time following this accident with the first roller completely removed (R. 38, 58).

Defendant by its instruction (R. 92) recognized that the question whether the conveyor as installed was inherently or imminently dangerous was one for the jury and submitted that issue for resolution by the jury, and the jury resolved the question in favor of plaintiff.

Also the Court of Appeals in its opinion held, "It is perfectly obvious that there was nothing latent, hidden or defective about the condition and that the distance between the two conveyors was open and obvious for all to see" (R. 114). This, without regard to the fact that two persons (plaintiff being one) were injured by the appliance within a space of two days (R. 35); that in the opinion of Conway Briscoe, accepted by the jury, the clearance between the roller and the belt would not be as visible to a lay person as to an engineer, and that an engineer would spot it readily but a lay person would most likely find out the hard way, by getting their hand in there (R. 29); and that defendant by its instruction (R. 90) recognized that the question whether the condition was open and obvious was one for resolution by the jury, who resolved that question in favor of plaintiff.

We respectfully submit that in holding as a matter of law that this condition was open and obvious and that the placing of the conveyors only ⅝ths of an inch apart did not create an inherently or imminently dangerous condition, the Court of Appeals of the Eighth Circuit failed to accept the findings of the jury on issues clearly shown to be ones on which reasonable men may differ, but substituted its judgment for the finding of the jury on issues properly submitted to and resolved by the jury.

Under the decision of this Court in Erie R. Co. v. Tompkins, supra, the Circuit Court of Appeals was obliged, but failed, to apply the law of Missouri as announced by the Supreme Court of that State in Swain v. Anders, 349 Mo. 963, 163 S. W. 2d 1045; Rouchene v. Gamble Construction

Co., 338 Mo. 123, 89 S. W. 2d 58; Frese v. Wells (Mo. Sup.), 40 S. W. 2d 652; Parker v. Nelson Grain and Milling Co., 330 Mo. 95, 48 S. W. 2d 906; Fortner v. St. Louis Public Service Co. (Mo. Sup.), 244 S. W. 2d 10, in which cases the Supreme Court of Missouri held that where reasonable men may differ as to whether an act or an omission or failure to act was negligent, the question of negligence or no negligence is one to be determined by the jury.

It is plain, we respectfully submit, that the Court of Appeals for the Eighth Circuit has, by its opinion here in question, come into conflict with the opinions of the Supreme Court of Missouri and the Kansas City Court of Appeals constituting the local law.

PRAYER FOR THE WRIT.

Wherefore, petitioner prays that a writ of certiorari be issued by this Honorable Court, directed to the United States Court of Appeals for the Eighth Circuit, to the end that the opinion and judgment of said Court of Appeals in the cause entitled "Standard Conveyor Company, a corporation, Appellant, v. Walter Scott, an Infant, by Ernest Scott, his next friend, Appellee," number 15,174 in said Court of Appeals, be reviewed by this Court as provided by law, and that the judgment of the United States Court of Appeals for the Eighth Circuit in said cause be reversed, and that petitioner have such other relief as to this Honorable Court may seem meet and proper.

Respectfully submitted,

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Of Counsel.

APPENDIX.

(Opinion.)

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 15,174.

Standard Conveyor Company, a corporation, Appellant, vs. Walter Scott, an Infant, by Ernest Scott, his next Friend, Appellee.	Appeal from the United States District Court for the Eastern District of Missouri.

[April 7, 1955.]

Ernest E. Baker (Alexander & Robertson and L. A. Robertson were with him on the brief), for Appellant.

J. C. Jaeckel (F. X. Cleary, and Moser, Marsalek, Carpenter, Cleary & Carter were with him on the brief), for Appellee.

Before Sanborn, Johnsen and Vogel, Circuit Judges.

Vogel, Circuit Judge.

Plaintiff (appellee) brought this action to recover damages for personal injuries. The case was tried to a jury and resulted in a verdict for the plaintiff. At the time of

the injury, plaintiff, a 17-year-old youth, was an employee of the Schneithorst Concessions at the St. Louis Municipal Airport. Schneithorst Concessions was engaged in preparing food to be served to airplane passengers. The food was transported to the airplanes in aluminum containers. The containers were placed on a power-driven belt conveyor at the basement level of the building and carried upward thereon to the ground level, where they were discharged by the belt conveyor onto a gravity roller conveyor, from which they were loaded onto trucks.

Defendant (appellant) by contract with Schneithorst, had manufactured and installed both the power-driven belt conveyor and the fixed roller gravity conveyor. It had completed installation of the conveyors prior to the injury. Schneithorst Concessions, plaintiff's employer, was in complete charge and possession at all times in question. One of plaintiff's duties was to lift the food containers from the roller conveyor and place them upon trucks. On the occasion of the injury and while he was so engaged, a large container came up the belt conveyor and caught at the junction between the two conveyors. This sometimes occurred when containers were placed on the belt conveyor in a crooked position or improper angle. Plaintiff had been told to push the containers over when this occurred. He attempted to do this, but his right hand, which was damp from perspiration, slipped and went between the belt conveyor and the first roller of the gravity conveyor. There was accessible to the plaintiff or to anyone dislodging food containers at the junction of the two conveyors a device whereby the power-driven conveyor could be stopped or reversed. Upon being unable to pull his hand out of the conveyor, plaintiff stopped the conveyor and then reversed it, thus releasing his hand. He sustained some partial permanent disability to his right hand in that the thumb is limited in motion away from the rest of the hand and the skin which was grafted on the palm of the hand cracks

and is more tender than natural palm skin so it is necessary for him to put vaseline on the hand or to use a glove when working.

Plaintiff charges that defendant negligently designed, manufactured and installed the conveyors. The specific negligence complained of is that the space between the end of the belt of the power-driven conveyor and the first fixed roller of the gravity conveyor was too narrow and was such that a person's hand would be injured if caught between the belt and the fixed roller.

At the close of all the evidence defendant moved for a directed verdict. Its motion was denied. The jury returned a verdict in favor of plaintiff for $25,000.00. Subsequent to the jury's verdict and the entry of judgment thereon, defendant moved that the verdict and judgment be set aside and for judgment in its favor in accordance with its prior motion for a directed verdict, or in the alternative for a new trial. The trial court denied defendant's motion for judgment, but directed that the alternative motion for a new trial be granted unless plaintiff within ten days should remit $7,000.00 of the amount of the judgment. Plaintiff filed such a remittitur, and the court entered an order denying defendant's alternative motion for a new trial. Defendant has appealed from the judgment.

Defendant's first ground for appeal is that the trial court erred in denying its motion for a directed verdict. Such motion was based upon the following grounds:

1. Because the evidence shows that plaintiff was negligent as a matter of law, and that such negligence directly and proximately caused or contributed to cause his injury.

2. Because the evidence fails to show that defendant committed any act of negligence in the design, manufacture and sale of the conveyor belt and conveyor roller in question.

3. Because the evidence fails to show that defendant commited any act of negligence that directly and proximately caused or contributed to cause plaintiff's injury.

4. Because the evidence fails to show facts upon which plaintiff is entitled to recover against defendant.

As the manufacturer and installer of the conveyor equipment, defendant's responsibility is a limited one. The general rule, as stated in **Employers' Liability Assur. Corp., Ltd., v. Columbus McKinnon Chain Co.** (D. C. W. D. N. Y. 1926), 13 F. 2d 128, is as follows:

> "* * * the general rule being 'that a manufacturer or seller is not liable to third persons, who have no contractual relations with him, for negligence in the construction, manufacture, or sale of articles manufactured or sold.' There are, however, exceptions to this broad rule; e. g., where the article sold is inherently or imminently dangerous. The term 'imminently dangerous' does not imply that the article sold must at all times be imminently dangerous, such as poisons or explosives are known to be. It suffices if the nature and quality of the thing sold is reasonably certain, as Judge Cardozo said in **MacPherson v. Buick Motor Co.**, 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916F, 696, Ann. Cas. 1916C, 440, to place life or limb in peril, and was negligently made, for then it became a thing of danger."

We are in this case bound by the law of the State of Missouri. The Supreme Court of that state, in the case of **Tayer v. York Ice Machinery Corp.**, 119 S. W. 2d 240, 243, has stated the rule in this fashion:

> "These cases, as well as the **McLeod** Case, do not impose upon a manufacturer the obligation of an insurer. The action sounds in tort, is based on negligence, and the legal obligation cast by the cases upon

a manufacturer requires the exercise of due care in manufacturing and marketing merchandise imminently, intrinsically, inherently, or essentially dangerous in itself or when applied to its intended use."

Plaintiff claims here that installing the power-operated portion of the equipment with only ⅝ths inch clearance between the moving belt and the fixed roller created a condition "inherently or imminently dangerous" and that therefore defendant is responsible. The persons who installed the equipment stated in substance that it was necessary for the two conveyors to be close together so that the packages to be conveyed would not tip into the space between the two conveyors and thus stop. It is the narrowness of this space of which complaint is made. If placing the conveyors ⅝ths of an inch apart was negligence, what then was the proper distance? A smaller space, instead of preventing a hand from going between the conveyors, might have made for a more severe injury. A greater space might allow an arm or a foot to become involved. It cannot be said, as plaintiff would have us say, that a ⅝ths inch space is negligence and another size is not. The placing of the conveyors only ⅝ths of an inch apart did not create an inherently or imminently dangerous condition.

It is perfectly obvious that there was nothing latent, hidden or defective about the condition and that the distance between the two conveyors was open and obvious for all to see. We do not believe it can be said that the condition was inherently or imminently dangerous any more than any moving machinery may be said to be inherently or imminently dangerous. To hold the manufacturer and installer of this equipment liable for injuries would be tantamount to holding the manufacturer and installer of any moving machinery responsible for all injuries connected with its use.

Plaintiff relies quite strongly upon the case of **McLeod v. Linde Air Products Co.**, 318 Mo. 397, 1 S. W. 2d 122. That case is easily distinguishable on the facts. Therein plaintiff's father purchased from defendant manufactured oxygen in steel tanks having an outlet valve at the top of each tank. The tanks remained the property of the defendant and were returned to them when empty. Fifteen minutes after the delivery of a tank, an employee undertook to permit oxygen to flow from the tank. The oxygen did not flow and the tank seemed to be empty. It was placed to one side without closing the valve. It appeared, however, that the valve had become clogged by rust and other substances which, upon being subjected to a pressure of 1800 pounds per square inch, suddenly cleared the valve and the gas escaped in an explosive manner, whereby plaintiff was seriously injured.

The dangerous condition or situation in the **McLeod** case was not known to the plaintiff or plaintiff's employer, could not be seen and was in no way obvious. The tank, because of its defective condition, became imminently dangerous and defendant was held responsible for the resulting injury.

In order to hold defendant responsible in the instant case, it must be found that the conveyors were inherently or imminently dangerous. The record justifies no such conclusion.

Defendant's motion for judgment notwithstanding the verdict should have been granted. The case is reversed with instructions to enter judgment for the defendant.

UNITED STATES COURT OF APPEALS,
Eighth Circuit.

No. 15,174,
Civil.

Standard Conveyor Company, a Corporation,
Appellant,

vs.

Walter Scott, an Infant, by Ernest Scott,
His Next Friend,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

Appellee's Motion for Rehearing.

Comes now Walter Scott, an infant, by Ernest Scott, his next friend, the appellee herein, and respectfully moves the Court to set aside its opinion and decision herein rendered on the 7th day of April, 1955, and to grant him a rehearing in this cause, and as grounds for this motion states:

I.

In holding (p. 5) "The placing of the conveyors only ⅜ths of an inch apart did not create an inherently or imminently dangerous condition," the Court failed to accept the finding of the jury on an issue clearly shown by the language of the Court (p. 5) to be one on which reasonable minds may differ.

II.

In holding (p. 5) "The placing of the conveyors only ⅜ths of an inch apart did not create an inherently or imminently dangerous condition," the Court substituted its judgment for the finding of the jury upon an issue properly submitted to and resolved by the jury.

III.

In holding (p. 5) "The placing of the conveyors only 3/8ths of an inch apart did not create an inherently or imminently dangerous condition," the Court overlooked and failed to take into consideration the fact that defendant, by its Instruction (R. 92), recognized that the question whether the conveyor as installed was inherently or imminently dangerous was one for the jury and submitted that issue for resolution by the jury.

IV.

In holding (p. 5) "The placing of the conveyors only 3/8ths of an inch apart did not create an inherently or imminently dangerous condition" the Court overlooked and failed to take into consideration the fact that two persons (plaintiff being one) were injured by the appliance within a space of two days (R. 35).

V.

In holding (p. 5) "The placing of the conveyors only 3/8ths of an inch apart did not create an inherently or imminently dangerous condition" the Court overlooked and failed to take into consideration the case of Murphy v. Missouri Power and Light Co. (Mo. App.), 214 S. W. 2d 742 (Appellee's Brief, p. 9), involving facts and issues substantially similar and identical in principle to those in the instant case.

VI.

In holding (p. 5) "The placing of the conveyors only 3/8ths of an inch apart did not create an inherently and imminently dangerous condition" the Court overlooked and failed to take into consideration the testimony of plaintiff's witness, L. D. Tracy, safety engineer, accepted by the jury, that in his opinion the construction of the conveyor was a very unsafe condition for the use for

which it was designed (R. 31) and that any clearance that endangers property or person at a point such as this happened to be is not good safety engineering (R. 30).

VII.

In holding (p. 5) "The placing of the conveyors only ⅜ths of an inch apart did not create an inherently and imminently dangerous condition" the Court overlooked and failed to take into consideration the testimony of defendant's expert witness, Elmer S. Stanley, that he would prefer to see a safety device of some kind in that position (R. 64), and the testimony of defendant's expert witness, John C. Georgian, that if there is a possibility of a man's hand getting in between those two rollers, if there is a very good likelihood of people working close by these rollers and having to take objects off at this exact point so that their hands are liable to be caught between these two rollers, it would then be necessary for the manufacturer to be sure that there is a safeguard of some type or other at this transfer point (R. 69).

VIII.

In posing the question (p. 5) "If placing the conveyors ⅜ths of an inch apart was negligence, what then was the proper distance?" the Court overlooked and failed to take into consideration the testimony of plaintiff's witness, L. D. Tracy, accepted by the jury, that if the conveyor had been erected as called for in the specifications there would have been approximately an inch, maybe an inch and a quarter, between the roller and the belt and that there was a change in the conveyor between the way it was originally designed and the way it was finally installed (R. 30), and further overlooked and failed to take into consideration the testimony of defendant's own expert, John C. Georgian, that he (plaintiff) would have a hard time getting his hand caught between the rollers with an inch space between the two rollers (R. 68).

IX.

In holding (p. 5) "a greater space might allow an arm or a foot to become involved," the Court overlooked and failed to take into consideration the testimony of defendant's own witness, J. R. Moran, the installer of the conveyor, that if a package gets stuck at the junction of the power conveyor and the gravity conveyor a man would have to go there, that they would be very close to the conveyor in doing so (R. 50), and that if a container got stuck a person could just push it and it would go on (R. 51), and the Court further overlooked and failed to take into consideration that this would normally be done with the hand, not an arm, foot, or any other portion of the body.

X.

In holding (p. 5) "a greater space might allow an arm or a foot to become involved" the Court overlooked and failed to take into consideration that the conveyor was about 22 inches in elevation (R. 50), which fact would make it most unlikely that any portion of the anatomy other than the hand would be placed in contact with or in dangerous proximity to the top of the conveyor so as to become engaged in the space between the rollers at the point in question.

XI.

In holding (p. 5) "a greater space might allow an arm or a foot to become involved" the Court overlooked and failed to take into consideration that the very nature of the conveyor and its intended use would require the hands, not other portions of the anatomy, to come in contact with or in dangerous proximity to the top of the conveyor so as to become engaged in the space between the rollers at the point in question.

XII.

In holding (p. 5), "The persons who installed the equipment stated, in substance, that it was necessary for the two conveyors to be close together so that the packages to be conveyed would not tip into the space between the two conveyors and thus stop," the Court overlooked and failed to take into consideration that if erected as called for in the specifications there would have been approximately an inch, maybe an inch and one-quarter, between the roller and the belt (R. 30), and that if an inch and one-half space separated the two rollers the distance from the top radius of the belt or roller and the top radius of the first roller on the roller conveyor would be six inches, which would pass a 12-inch container (R. 69), and the Court further overlooked and failed to consider that if the distance between the rollers were reduced to one inch or one inch and one-quarter instead of one inch and one-half, that the distance from the top radius of the belt or roller and the top radius of the first roller on the roller conveyor would be less than six inches and would surely pass a 12-inch container.

XIII.

In holding (p. 5), "The persons who installed the equipment stated, in substance, that it was necessary for the two conveyors to be close together so that the packages to be conveyed would not tip into the space between the two conveyors and thus stop," the Court overlooked and failed to take into consideration the opinion of Conway Briscoe, a mechanical engineer and Director of Public Utilities for the City of St. Louis, accepted by the jury, that the roller could have been moved back from the belt far enough to permit a human hand to go down there and not crush it without destroying the efficiency of the conveyor (R. 29).

XIV.

In holding (p. 5) "The persons who installed the equipment stated in substance that it was necessary for the two conveyors to be close together so that the packages to be conveyed would not tip into the space between the two conveyors and thus stop" the Court overlooked and failed to take into consideration the fact that the jury did not accept the testimony of the persons referred to.

XV.

In holding (p. 5) "The persons who installed the equipment stated in substance that it was necessary for the two conveyors to be close together so that the packages to be conveyed would not tip into the space between the two conveyors and thus stop" the Court overlooked and failed to take into consideration the testimony that even with the roller removed they used the roller conveyor for some time to send up those commodities (R. 38).

XVI.

In holding (p. 5) "It is perfectly obvious that there was nothing latent, hidden or defective about the condition and that the distance between the two conveyors was open and obvious for all to see" the Court overlooked and failed to take into consideration the opinion of Conway Briscoe, accepted by the jury, that the clearance between the roller and the belt would not be as visible to a lay person as to an engineer, and that an engineer would spot it readily but a lay person would mostly likely find out the hard way, by getting their hand in there (R. 29).

XVII.

In holding (p. 5) "It is perfectly obvious that there was nothing latent, hidden or defective about the condition and that the distance between the two conveyors was

open and obvious for all to see" the Court overlooked and failed to take into consideration the fact that two persons (plaintiff being one) were injured by the appliance within a space of two days (R. 35).

XVIII.

In holding (p. 5) "It is perfectly obvious that there was nothing latent, hidden or defective about the condition and that the distance between the two conveyors was open and obvious for all to see" the Court overlooked and failed to take into consideration the case of Murphy v. Missouri Power and Light Co., supra, involving facts and issues substantially similar, and identical in principle to those in the instant case.

XIX.

In holding (p. 5) "It is perfectly obvious that there was nothing latent, hidden or defective about the condition and that the distance between the two conveyors was open and obvious for all to see" the Court failed to accept the findings of the jury on an issue clearly shown to be one on which reasonable minds may differ.

XX.

In holding (p. 5) "It is perfectly obvious that there was nothing latent, hidden or defective about the condition and that the distance between the two conveyors was open and obvious for all to see" the Court substituted its judgment for the finding of the jury upon an issue properly submitted to and resolved by the jury.

XXI.

In holding (p. 5) "It is perfectly obvious that there was nothing latent, hidden or defective about the condition and that the distance between the two conveyors was

open and obvious for all to see" the Court overlooked and failed to take into consideration the fact that defendant, by its Instruction (R. 90), recognized that the question whether the condition was open and obvious was one for the jury and submitted that issue for resolution by the jury.

Wherefore, the above premises considered, appellee respectfully moves the Court to set aside its opinion and decision herein rendered on the 7th day of April, 1955, and to grant him a rehearing in this cause.

Respectfully submitted,

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Certificate of Counsel.

The undersigned, counsel for the appellee in the above cause, hereby certify that the foregoing petition for a rehearing is filed in good faith and is believed to be meritorious.

F. X. Cleary,
F. X. Cleary,
J. C. Jaeckel,
J. C. Jaeckel.

(Order Denying Motion of Appellee for Rehearing.)

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15174——September Term, 1954.
Tuesday, May 3, 1955.

Standard Conveyor Company, a Corporation, Appellant, vs. Walter Scott, an Infant, by Ernest Scott, His Next Friend.	Appeal from the United States District Court for the Eastern District of Missouri.

Motion of appellee for a rehearing in this cause has been considered by this Court, and It is now here Ordered that the same be, and it is hereby, denied.

May 3, 1955.

(Order Staying Issuance of Mandate.)

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15174——September Term, 1954.
Thursday, May 19, 1955.

Standard Conveyor Company, a Corporation, Appellant, vs. Walter Scott, an Infant, by Ernest Scott, His Next Friend.	Appeal from the United States District Court for the Eastern District of Missouri.

On Consideration of the motion of the appellee for a stay of the mandate in this cause pending a petition to the Su-

preme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

May 19, 1955.

FILED
JUL 11 1955
HAROLD C. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

WALTER SCOTT, an Infant, by Ernest Scott, His Next Friend,
Petitioner,
vs.
STANDARD CONVEYOR COMPANY, a Corporation,
Respondent.
No. 158.

RESPONDENT'S BRIEF.

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INDEX.

Page

Subject Index.

Opinion of the United States Court of Appeals, Eighth Circuit 1

Jurisdiction 2

Statement of Facts 2

Summary Statement of Points of Fact and Law to Be Argued 4

Argument 7

1. The conveyor was erected in accordance with the contract 7
2. The contractor was not required to provide safety devices 8
3. The efficient operation of the conveyor required it to be installed as it was..... 9
4. The ruling of the court below is not in conflict with applicable local law 10
5. The ruling of the court below is not in conflict with applicable local decisions 11

Conclusion 14

Authorities Cited.

Chisnall v. Thompson, 363 Mo. 538, 252 S. W. 2d 335, 337, 338 .....5, 6, 11, 14

Crandall v. McGilvory, 270 S. W. 2d 793, 798, 799 .....5, 6, 11, 13-14

Dempsey v. Virginia Dare Stores, 239 Mo. App. 355, 186 S. W. 2d 217, 219, 220.....5, 6, 11, 13, 14

Evans v. Massman Construction Co., 343 Mo. 632, 122 S. W. 2d 924, 930..... 4, 8

Fortner v. St. Louis Public Service Co. (Mo. Sup.), 244 S. W. 2d 10.....5, 13
Frese v. Wells (Mo. Sup.), 40 S. W. 2d 652.....5, 13
Isbell v. Biederman Furniture Co. (Mo. App.), 115 S. W. 2d 46, 49, 50.....5, 6, 11, 13
McCormick v. Lowe & Campbell Athletic Goods Co., 235 Mo. App. 612, 144 S. W. 2d 866, 871..... 5
McLeod v. Linde Air Products Co., 318 Mo. 397, 1 S. W. 2d 122.....4, 5, 10, 11, 12
Murphy v. Missouri Power & Light Co. (Mo. App.), 214 S. W. 2d 742.....5, 12, 13
Parker v. Nelson Grain & Milling Co., 330 Mo. 95, 48 S. W. 2d 906.....5, 13
Rouchene v. Gamble Construction Co., 338 Mo. 123, 89 S. W. 2d 58.....5, 13
Swain v. Anders, 349 Mo. 963, 163 S. W. 2d 1045....5, 13
Tayer v. York Ice Machinery Co., 242 Mo. 912, 119 S. W. 2d 240, 242, 243, 244.....4, 10
Vietmeier v. Voss (Mo. Sup.), 246 S. W. 2d 785, 787, 788 .....5, 6, 11, 14

Statute Cited.

Title 28, U. S. C., Section 1254 (1)..... 2

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

WALTER SCOTT, an Infant, by Ernest Scott, His Next Friend,
Petitioner,
vs.
STANDARD CONVEYOR COMPANY, a Corporation,
Respondent.
No. 153.

RESPONDENT'S BRIEF.

OPINION OF THE COURT BELOW.

The opinion of the United States Court of Appeals for the Eighth Circuit in the cause of "Standard Conveyor Company, a corporation, Appellant, versus Walter Scott, an Infant, by Ernest Scott, his Next Friend, Appellee," of which opinion petitioner seeks review, appears on pages 110-116, inclusive, of the record filed herewith. Said opinion has not yet been officially published.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

Petitioner seeks to invoke the jurisdiction of this Honorable Court under Title 28, United States Code, Sections 1254 (1) and 2101 (c) (28 U. S. C. A., Sections 1254, 2101), and upon Rule 19, Section 1 (b) of the Revised Rules of this Court, providing for review by writ of certiorari of judgments of the United States Court of Appeals.

STATEMENT OF FACTS AS TO QUESTIONS TO BE PRESENTED.

The written contract under which the conveyor in question was installed by defendant for plaintiff's employer, Schneithorst Concessions, provided in paragraph 10 that the contractor shall not be required to furnish any safety devices except those specified herein and none were specified. Paragraph 22 provided that the purchaser may cause changes in the installation of the conveyor. Paragraph 23 provided for examination and testing of the conveyor by the purchaser on completion of the installation. Defendant's Exhibit No. 1 identified (R. 47, 54), introduced (R. 72). Appearing at (R. 74-84).

Plaintiff's evidence discloses that the purchaser of the conveyor had cream and sugar packages consisting of egg carton boxes 3½ to 4 inches wide, and 5½ to 6 inches long, which it desired to and did send up on the conveyor (R. 37). The written contract provided that the conveyor would be installed to accommodate and transport containers from 12 inches long upward. Defendant's Exhibit 1 identified (R. 47, 54), introduced (R. 72, 74 and 84). Defendant's Exhibit 2 referred to in plaintiff's evidence (R. 30, 32). Identified (R. 47, 54), introduced (R. 85).

Several days before petitioner was injured a small boy five years of age, was allowed to play around the conveyor while it was in operation and this small boy was discovered with his arm caught between the rollers of the conveyor (R. 35).

Plaintiff's evidence discloses the estimate of distance between the top of the power drum and the top of the first fixed roller as 5½ to 6 inches, and that the front edge of containers that come up the conveyor belt must pass over a space until it reaches the top of the metal roller. That the longer the gap between the power roller and the first fixed metal roller the less likely small materials or packages have to bridge that gap. That if the space between the top of the power drum and the first fixed metal roller was too great the package would tip down into the space and stop (R. 33). That a package 6 inches long would not clear a space as great as the 12 inch containers mentioned in the written contract. That the space between the power belt and the mechanical roller determines the efficiency with which the conveyor will handle small packages. That a space of ⅜th's of an inch between the belt conveyor and the first fixed roller of the conveyor would be proper under conditions where small packages that would not bridge a larger gap were to be transported on the conveyor (R. 33). That the blue print does not indicate that the Schneithorst Concessions did not request respondent to bring the rollers closer together by notching the frame (R. 34).

One of defendant's installation men testified that the space between the power drum of the belt conveyor and the first fixed metal roller would be determined by the length of the commodity to go over the conveyor (R. 48). Similar evidence was given by a conveyor engineer, Elmer S. Stanley, on behalf of defendant (R. 63).

John C. Georgian, Associate Professor of Mechanical Engineering at Washington University Engineering School, testified for defendant that the notching of the frame of the roller conveyor permitted the rollers to be drawn 22/100's of an inch nearer to each other than if the notching had not been made. That his computation was made upon measurements of the conveyor (R. 67).

SUMMARY STATEMENT OF POINTS OF FACT AND LAW TO BE ARGUED.

I.

The conveyor was constructed as provided in the contract between Standard Conveyor Company and petitioner's employer.

Evans v. Massman Construction Co., 122 S. W. 2d 924, 930, 931.

II.

The written contract provided that the contractor shall not furnish safety devices.

III.

The efficient operation of the conveyor required it to be installed as it was.

IV.

The rulings of the United States Court of Appeals for the Eighth Circuit in the instant case that "the placing of the conveyors only ⅜th's of an inch apart did not create an inherently or imminently dangerous condition", and the ruling that "It is perfectly obvious that there was nothing latent, hidden or defective about the condition, and that the distance between the two conveyors was open and obvious for all to see" are not in conflict with applicable local law.

Tayer v. York Ice Machinery Co., 242 Mo. 912, 119 S. W. (2) 240, 242, 243, 244;

McLeod v. Linde Air Products Co., 318 Mo. 397, 1 S. W. (2) 122;

McCormick v. Lowe & Campbell Ath. Goods Co., 235 Mo. App. 612, 144 S. W. (2) 866, 871;

Vietmeier v. Voss (Mo. Sup.), 246 S. W. (2) 785, 787, 788;

Crandall v. McGilvory (Mo. Sup.), 270 S. W. (2) 793, 798, 799;

Chisnall v. Thompson, 363 Mo. 538, 252 S. W. (2) 335, 337, 338;

Dempsey v. Virginia Dare Stores, 239 Mo. App. 355, 186 S. W. (2) 217, 219, 220;

Isbel v. Biederman Furniture Co. (Mo. App.), 115 S. W. (2) 46, 49, 50.

V.

The ruling of the United States Court of Appeals for the Eighth Circuit that "the placing of the conveyors three-eighths of an inch apart did not create an inherently or imminently dangerous condition," and the ruling that "it is perfectly obvious that there was nothing latent, hidden or defective about the condition, and that the distance between the two conveyors was open and obvious for all to see," are not in conflict with decisions of the Supreme Court of Missouri in McLeod v. Linde Air Products Co., 1 S. W. 2d 122, 318 Mo. 397; Swain v. Anders, 163 S. W. 2d 1045, 349 Mo. 963; Rauchene v. Gamble Construction Co., 89 S. W. 2d 58, 338 Mo. 123; Frese v. Wells (Mo. Sup.), 40 S. W. 2d 652; Parker v. Nelson Grain & Milling Co., 48 S. W. 2d 906, 330 Mo. 95; Fortner v. St. Louis Public Service Co. (Mo. Sup.), 244 S. W. 2d 10, or the Kansas City Court of Appeals in the case of Murphy v. Mo. Power & Light Co. (Mo. App.), 214 S. W. 2d 742.

McLeod v. Linde Air Products Co., 318 Mo. 397, 1 S. W. (2) 122;

Murphy v. Missouri Power & Light Co. (Mo. App.), 214 S. W. (2) 742;

Dempsey v. Virginia Dare Stores Co., 239 Mo. App. 355, 186 S. W. (2) 217, 219, 220;

Isbell v. Biederman Furniture Co. (Mo. App.), 115 S. W. (2) 46, 49, 50;

Crandall v. McGilvory (Mo. Sup.), 270 S. W. (2) 793, 798, 799;

Chisnall v. Thompson, 363 Mo. 538, 252 S. W. (2) 335, 337, 338;

Vietmeier v. Voss (Mo. Sup.), 246 S. W. (2) 785, 787, 788.

ARGUMENT.

I.

The Conveyor Was Erected in Accordance With Contract.

The petitioner's employer supplied cooked food in containers to the airplanes at the St. Louis Municipal Airport. It desired to have a food conveyor to transport the food from the basement to the ground level outside the building. It entered into a written contract with respondent. Defendant's Exhibit 1 identified (R. 47, 54) and introduced (R. 72, 74 and 84).

The written contract described the dimensions of food containers to be transported as being from 12 to 28½ inches long. Based on this information respondent sold to petitioner's employer a conveyor to accommodate these containers (R. 55). The written contract provided for modification by the purchaser (R. 81). The contract also provided for an inspection and approval by the purchaser on completion of the installation (R. 81). It appeared from plaintiff's evidence that the petitioner's employer desired to transport smaller packages than those described in the written contract, some of which were only six inches long upon the conveyor (R. 37), and that if the space between the rollers was too great the packages would fall into the space and would not go along the conveyor (R. 33). This required the space between the rollers to be less than the space required for the containers described in the written contract (R. 33).

Petitioner urges that the conveyor was not installed according to the contract. This the respondent denies. However, if the conveyor was not installed as shown by the contract it appears from the evidence that any change was

made at the request of the purchaser to accommodate the smaller packages it intended to transport on the conveyor, or was approved and accepted by the purchaser, and amounted to a compliance with the terms of the contract between respondent and the purchaser. Evans v. Massman Construction Co., 122 S. W. 2d 924, 930, 343 Mo. 632.

II.

The Contractor Was Not Required to Provide Safety Devices.

The conveyor was installed under a written contract between petitioner's employer and respondent. The written contract was discussed in plaintiff's evidence Deft. Ex. 1 (R. 30, 31, 32). It was identified (R. 47, 54) and introduced (R. 72) and set out (R. 74-84). Paragraph 10 of this contract appearing at (R. 78) discloses that the contractor shall not be required to furnish any safety device on the conveyor except those specified in the contract. No safety devices were specified in the contract. Petitioner refers to the evidence of plaintiff's witnesses Tracy and Briscoe and two of defendant's witnesses concerning safety devices, but this evidence does not aid petitioner because there is no duty upon the respondent to provide safety devices under the contract.

In addition thereto the conveyor could be operated with absolute safety by turning the power off while petitioner was in the act of moving the obstructed container. Under these circumstances he could not have been hurt. He was the only person who knew that his hands were moist and were likely to slip on the container and under these circumstances it was his duty to stop the conveyor while dislodging the container if his moist hands made it dangerous to move the obstructed container without stopping the conveyor.

Petitioner's reference to safety devices does not tend to support plaintiff's right to recover or create any conflict with our local law because the written contract provides that no safety devices should be placed on the conveyor. The purchaser did not see fit to pay for such and it was not the duty of the respondent to install safety devices where the purchaser did not desire them.

III.

The Efficient Operation of the Conveyor Required That It Be Installed as It Was to Do the Work Required of It by Petitioner's Employer.

The efficient operation of the conveyor required that it be installed as it was installed to perform the work required of it by petitioner's employer. The written contract described the containers to be transported over the conveyor as being from 12 to 28½ inches in length (R. 75, 85). Plaintiff's evidence however discloses that his employer desired to transport smaller packages over the conveyor (R. 37). These smaller packages were only six inches in length (R. 37). This required the rollers of the two conveyors to be drawn closer together, otherwise the smaller packages would not have gone over the conveyor but would have fallen down into the space between the rollers (R. 33). Plaintiff's evidence discloses that it was proper to install the conveyor with a space of ⅜ths of an inch between the rollers if that was necessary to accommodate the packages that were to be transported on the conveyor (R. 33), and plaintiff's evidence discloses that the conveyor would not have efficiently transported the smaller packages, if the rollers had been farther apart (R. 33). The statement in the petition that none of the packages to be conveyed were small enough to require the narrow clearance between the rollers is based upon 12 inch packages (R. 33) and does

not accurately reflect the evidence bearing upon the transmission of a 6 inch package on the conveyor which plaintiff's evidence shows the purchaser did transport on the conveyor (R. 33, 37).

IV.

Ruling Is Not in Conflict With Applicable Local Law.

The opinion of the United States Court of Appeals for the Eighth Circuit in the instant case is not in conflict with applicable local law of Missouri. In the opinion the Court stated that it was in this case bound by the law of the State of Missouri. The Court then stated the correct applicable rule of law as set out in the opinion of the Supreme Court of Missouri in Tayer v. York Ice Machinery Co., 119 S. W. 2d 240, 243, 242 Mo. 912.

The case of Tayer v. York Ice Machinery Co., supra, was decided by the Supreme Court of Missouri subsequent to the decision in the case of McLeod v. Linde Air Products Co., 318 Mo. 397, 1 S. W. (2) 122. The Court in the Tayer case recognized and approved the rule of law as stated in the McLeod v. Linde Air Products Company case, supra, and explained and discussed that rule of law. Both the McLeod v. Linde Air Products and Tayer v. York Ice Machinery cases limited the liability of the manufacturer or supplier of goods to things inherently or imminently dangerous.

The United States Court of Appeals for the Eighth Circuit in the instant case adopted this rule of law stated in both the above cases and applied it to the facts shown by the evidence. It is not contended by petitioner that the Court in the instant case did not correctly state the rule of applicable Missouri law or that the case of Tayer v. York Ice Machinery Company does not state the Missouri rule of law applicable to the facts in the instant case correctly.

The sufficiency of the evidence to prove the essential facts to support a recovery by plaintiff is a question of law for the Court under the Missouri decisions. Vietmeier v. Voss, 246 S. W. 2d 785, 787, 788. It was therefore the duty of the United States Court of Appeals to examine the evidence and determine if the facts essential to a recovery by plaintiff were supported by substantial evidence. The Court did examine the evidence to determine if it supported a recovery for plaintiff under the above rule of law and found that the evidence was not substantial and did not prove that the conveyor in question was inherently or imminently dangerous.

Under the evidence favorable to plaintiff in the instant case it was the duty of the United States Court of Appeals for the Eighth Circuit to hold that the condition of the conveyor as shown by the evidence was open and obvious and was not inherently or imminently dangerous. Crandall v. McGilvory, 270 S. W. 2d 793, 798, 799; Chisnall v. Thompson, 252 S. W. 2d 335, 337, 338, 363 Mo. 538; Dempsey v. Virginia Dare Stores, 186 S. W. 2d 217, 219, 220, 239 Mo. App. 355; Isbell v. Biederman Furniture Co., 155 S. W. 2d 46, 49, 50 (Mo. App.).

V.

Ruling Is Not in Conflict With Applicable Local Decisions.

The opinion in the instant case is not in conflict with the decision of the Supreme Court of Missouri in the case of McLeod v. Linde Air Products Co., supra.

The United States Court of Appeals in its opinion discussed the McLeod case and distinguished the instant case from the McLeod case on the facts. The Court in its opinion noted that the Supreme Court of Missouri in the McLeod case held that the instrumentality causing the injury was imminently or inherently dangerous because

the defect (rust in the valve of an oxygen tank) could not be discovered by the purchaser or his employee, and due to this defective condition the valve of the oxygen tank operated in an unusual and unexpected manner, causing injury. The evidence in the instant case shows that the condition of the conveyor was open and obvious. Any one could see and observe it by looking. The evidence showed it was the duty of the purchaser (petitioner's employer) to inspect the conveyor. The injury in the instant case did not result from an unusual operation of the conveyor due to a hidden defect as was shown by the evidence in the McLeod case. These facts sufficiently distinguished the McLeod case from the instant case. The evidence in the McLeod case showing an imminently dangerous condition due to a defect in the oxygen tank authorized and supported a verdict in favor of plaintiff in that case, while the evidence in the instant case showing that the condition was open and obvious did not support a recovery in favor of plaintiff in the instant case. From this it appears that there is no conflict between the decisions in the instant case and the McLeod case.

There is no conflict between the opinion in the instant case and the decision of the Kansas City Court of Appeals in Murphy v. Missouri Power & Light Co., 214 S. W. 2d 742 (Mo. App.). The Murphy case is not in point here. In the instant case the Court was ruling on the sufficiency of the evidence and whether the essential issues of plaintiff's case were supported by substantial evidence, while in the Murphy case the sufficiency of the petition was under consideration. The allegations of the petition were that the instrumentality was imminently dangerous to plaintiff. The demurrer to the evidence in that case admitted the truth of this allegation and the Court was passing upon the question of whether the petition, taking this allegation to be true, stated a cause of action. The Court in the instant case is not concerned with the suffi-

ciency of a petition nor is the imminent danger of the instrumentality admitted in the instant case as was the situation in the Murphy case.

Furthermore, in the Murphy case the Court was dealing with a situation where the defendant was the supplier of electric power and the installer of the device causing injury. The Court held that the defendant in that case was required to exercise the highest degree of care while in the instant case only ordinary care is required of the defendant. In the Murphy case the plaintiff was relying upon a custom requiring certain installation of electric devices while there is no question of custom in the instant case. Because of the difference in the issues in these cases there is no conflict between the opinion in the instant case and the decision in the Murphy case.

The opinion in the instant case is not in conflict with the decisions of the Supreme Court of Missouri in the cases of Swain v. Anders, 163 S. W. 2d 1045, 349 Mo. 963; Rouchene v. Gamble Construction Co., 89 S. W. 2d 58, 338 Mo. 123; Frese v. Wells (Mo. Sup.), 40 S. W. 2d 652; Parker v. Nelson Grain & Milling Co., 48 S. W. 2d 906, 330 Mo. 95; Fortner v. St. Louis Public Service Co. (Mo. Sup.), 244 S. W. 2d 10.

In all of those cases the evidence was conflicting, or, where not conflicting, different inferences could be drawn on the evidence, and the Supreme Court of Missouri held that it was for the jury to determine what evidence was true or what inferences should be drawn.

The facts in the instant case are not in conflict and do not permit different inferences to be drawn. Dempsey v. Virginia Dare Stores, 186 S. W. 2d 217, 219, 220, 239 Mo. App. 355; Isbell v. Biederman Furniture Co., 115 S. W. 2d 46, 49, 50 (Mo. App.). Under the facts it was for the Court to determine if the evidence was substantial Cran-

dall v. McGilvory, 270 S. W. 2d 793, 798, 799; Chisnall v. Thompson, 252 S. W. 2d 335, 337, 338, 363 Mo. 538; Vietmeyer v. Voss, 246 S. W. (2) 785.

The testimony of Conway Briscoe, relied upon by petitioner to justify contrary inferences to be drawn from the evidence, is not sufficient for that purpose. He was not a conveyor expert or safety expert (R. 28). Dempsey v. Virginia Dare Stores, 186 S. W. 2d 217, 219, 220.

CONCLUSION.

The decision below is in accord with the established law of Missouri on the facts shown by the evidence. The petition presents no conflict either with applicable local law or with applicable local decisions of Missouri. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

WALTER SCOTT, an Infant, by Ernest Scott, His Next Friend,
Petitioner,
vs.
STANDARD CONVEYOR COMPANY, a Corporation,
Respondent.
No. 153.

PETITIONER'S REPLY BRIEF.

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INDEX.

Subject Index.

	Page
Argument	1-6
I. The conveyor was not erected in accordance with the contract	1
II. Testimony concerning the need for safety devices was evidence from which the jury could and did find that the condition as it existed was imminently dangerous	3
III. The use for which the conveyor was intended did not require the unauthorized alteration which created this imminently dangerous condition	4
IV. The Ruling is in conflict with applicable local law and decisions	4
Conclusion	6

Authorities Cited.

Berry v. Kansas City Public Service Co., 343 Mo. 474, 121 S. W. 2d 825	5
Connecticut Mutual Life Ins. Co. v. Lathrop, 4 S. Ct. 533, 111 U. S. 612, 28 L. Ed. 536	5
Evans v. Massman Construction Co., 343 Mo. 632, 122 S. W. 2d 924	3
Love et al. v. United States, C. C. A. Mo., 141 F. 2d 981	6
McLeod v. Linde Air Products Co., 318 Mo. 397, 1 S. W. 2d 122	3, 4
Murphy v. Missouri Power and Light Co. (Mo. App.), 214 S. W. 2d 742	5
Tayer v. York Ice Machinery Corp., 242 Mo. 912, 119 S. W. 2d 240	4

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PETITIONER'S REPLY BRIEF.

ARGUMENT.

I.

The conveyor was not erected in accordance with the contract.

Respondent, in its brief in opposition to petitioner's petition for writ of certiorari, abandons its trial theory that the conveyor as originally designed would not accommodate the twelve inch packages specified in the contract (R. 75, 85), and admits petitioner's contention that none of the packages so specified were small enough to require this dangerously narrow space between the fixed rollers and the power drum on the conveyor belt. Respondent now attempts to justify this dangerous condition

on the tenuous theory that petitioner's employer desired to transport smaller packages than those specified. There is no evidence to substantiate either this theory or respondent's statement "it appears from the evidence that any change was made at the request of the purchaser to accommodate the smaller packages it intended to transport on the conveyor" (Respondent's Brief, pp. 7, 8). True, plaintiff's witness Ella Fehrenz stated that after the conveyor was installed, they sent up some egg cartons about five and one-half to six inches long (R. 37). This is obviously a poor estimate of the length of an egg carton (an object in such common use that the court could take judicial notice of the fact that it is about twelve inches long); an estimate only, by which petitioner is not bound. However, taking this testimony at its face value, it tends to show only that after the conveyor was installed, petitioner's employer used the conveyor to transport such cartons. It in no way proves, nor even supports an inference, that petitioner's employer requested or desired a change from the contract which specified containers of a minimum length of twelve inches (R. 75, 85). And certainly, there is no other evidence in the record from which such an inference can be drawn.

It was respondent's theory at time of trial that this dangerous narrowing of the space was necessary to permit twelve inch containers to pass from one conveyor to the other. J. R. Moran, who installed this conveyor for respondent so testified (R. 48-50). No one would know better than he, had Schneithorst requested a change in the conveyor to accommodate smaller containers, but he did not so testify (R. 47-52). Nor did Richard F. Donahower, Sales Manager for Respondent, who negotiated the contract with Schneithorst. Surely, had the change been requested by Schneithorst, this witness would have so testified. Respondent further offered to prove by this witness that had the conveyors been installed ac-

cording to design the equipment would not be able to handle the twelve inch length package (R. 60). The jury rejected this testimony and respondent now abandons it.

Nor does the acceptance and use of the conveyor by Schneithorst condone the dangerous installation made by respondent. There is no evidence that Schneithorst was either an engineer or a conveyor expert and the failure to install the conveyors as required by the contract did not create an open and obvious condition readily recognizable by a lay person (R. 29). The situation in Evans v. Massman Construction Co., 343 Mo. 632, 122 S. W. 2d 924, relied on by respondent, is in no way similar to the instant situation and that case is not authority for respondent's position herein. Should it be held that acceptance or use by the purchaser relieves the manufacturer, designer and/or installer of liability to a third person, then there would be no reason for the rule as announced by the Missouri Supreme Court in McLeod v. Linde Air Products Co., 318 Mo. 397, 1 S. W. 2d 122. The conveyors were not installed in accordance with the contract between respondent and Schneithorst, there is absolutely no evidence from which the Court or jury could infer that Schneithorst requested or even agreed to a change in the contract, and respondent is responsible to petitioner for injuries resulting from the imminently dangerous condition resulting from the unauthorized deviation from the contract.

II.

Testimony concerning the need for safety devices was evidence from which the jury could and did find that the condition as it existed was imminently dangerous.

Under Missouri law, petitioner was not required to prove that the conveyor in question was inherently dangerous in order to recover from respondent, but only to prove that it became dangerous when applied to its in-

tended use. McLeod v. Linde Air Products Co., supra; Tayer v. York Ice Machinery Corp., 242 Mo. 912, 119 S. W. 2d 240.

Without regard to the contractual obligation between respondent and Schneithorst concerning safety devices, the testimony of respondent's experts concerning the need for such devices (R. 64, 69), was evidence from which the jury could and did find that the condition complained of was imminently dangerous when the conveyor was applied to its intended use. Even without this evidence from respondent's experts concerning the need for safety devices however, the jury could have so found from the testimony of L. C. Tracy, petitioner's expert, that in his opinion the construction of the conveyor was a very unsafe condition for the use for which it was designed (R. 31).

III.

The use for which the conveyor was intended did not require the unauthorized alteration which created this imminently dangerous condition.

This point has been fully covered under Point I, supra, and in Petition for Writ of Certiorari (p. 22), and for sake of brevity will not be further discussed here, other than to again point out that there is no evidence that the conveyor was intended to be used to transmit containers of less than twelve inches in length as provided in the contract (R. 75, 85).

IV.

The Ruling is in conflict with applicable local law and decisions.

If there is any competent evidence from which the jury could reasonably conclude that a plaintiff is entitled to a

recovery from a defendant, then a court must submit the case to the jury and a failure on the part of the court to submit such a case to the jury would be error. The Supreme Court of Missouri so held in Berry v. Kansas City Public Service Co., 343 Mo. 474, 121 S. W. 2d 825. In the instant case, the testimony was not of such a conclusive character as to compel the trial court to withdraw the matter from the jury or to set aside a verdict for petitioner, and the trial court, in the exercise of a sound judicial discretion allowed the jury verdict to stand, following the rule laid down by the Supreme Court of the United States in Connecticut Mutual Life Ins. Co. v. Lathrop, 4 S. Ct. 533, 111 U. S. 612, 28 L. Ed. 536.

The cases cited by respondent in support of Points IV and V of its Brief all deal with situations wherein an essential element of proof was lacking. Not so in the instant case where there was ample evidence from which the jury could and did find that the condition complained of was imminently dangerous and that it was not open and obvious. The above is more fully argued by petitioner in his Petition for Writ of Certiorari (pp. 18-24).

Respondent in his Brief (p. 13) states that the facts in the instant case are not in conflict and do not permit different inferences to be drawn. If this be true, it is because all of the experts agree that the condition complained of is a dangerous one. Surely respondent does not contend that if all the evidence is in favor of a plaintiff, then the court must direct a verdict for the defendant!

In arguing that Murphy v. Missouri Power and Light Co. (Mo. App.), 214 S. W. 2d 742, is not in point here, respondent overlooks the fact that the petition therein alleged not only that the condition was imminently dangerous but further pleaded the facts to substantiate that allegation, and the court held that the facts so pleaded, if proven, were sufficient to substantiate that allegation. The point

of law and the factual situation therein involved are practically identical to those in the instant case.

Respondent at this late date questions the qualifications of petitioner's witness, Conway Briscoe. Whether a witness is qualified to express an opinion on a given question is a preliminary question for the trial judge, the determination of which is within his discretion, which is conclusive except for abuse or a clear error of law. Love et al. v. United States (C. C. A., Mo.), 141 F. 2d 981. No objection to his qualifications was raised at trial. He is a graduate mechanical engineer holding the very responsible position of Director of Public Utilities for the City of St. Louis, Missouri. The weight to be given Mr. Briscoe's testimony is within the province of the jury who accepted his qualifications and his testimony. Respondent cannot now contend that petitioner is not entitled to the benefit of this testimony.

CONCLUSION.

Petitioner respectfully submits that the Court of Appeals for the Eighth Circuit has, by its opinion here in question, come into conflict with the local law of Missouri, which it is obliged to follow and that petitioner's prayer for writ of certiorari should be granted by this Court.

Respectfully submitted,

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